

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

# ALPS PROPERTY & CASUALTY INSURANCE COMPANY.

Case No. 3:22-cv-00160-MMD-CSD

## ORDER

Flannell

LEVINE LAW GROUP, INC., et al.,

## Defendants.

## I. SUMMARY

Plaintiff Alps Property & Casualty Insurance Company seeks declaratory judgment that the legal malpractice insurance policy (“Policy”) it issued to Defendants Levine Law Group, Inc. and Ira S. Levine does not cover Defendants in a suit brought by The Parking REIT, Inc., MVP Realty Advisors, LLC, and Michael V. Shustek (collectively, the “Shustek Parties”) against Defendants in Nevada state court (“Shustek Action”),<sup>1</sup> along with a declaration of no duty to defend or indemnify and a declaration that Plaintiff is entitled to reimbursement from Defendants for expenses Plaintiff incurs in defending Defendants in the Shustek Action. (ECF No. 1.) Before the Court is Defendants’ motion to dismiss (ECF No. 12), or in the alternative, motion to transfer venue (ECF No. 13).<sup>2</sup> As further explained below, the Court in its discretion declines to exercise jurisdiction over this declaratory judgment action and therefore grants Defendants’ motion to dismiss.

<sup>1</sup>That case is currently pending in the Eighth Judicial District Court of the State of Nevada in Clark County. *The Parking REIT, Inc., et al. v. Ira S. Levine, et al.*, Case No. A-20-808902-C.

<sup>2</sup>Both motions are identical in content. For the sake of consistency, the Court will cite to Defendants' motion to dismiss (ECF No. 12) and corresponding exhibits throughout the order. Plaintiff responded (ECF No. 15), and Defendants replied (ECF No. 16).

1       **II. BACKGROUND**

2           The following allegations are adapted from Plaintiff's complaint (ECF No. 1) and  
 3 the Shustek Parties' state court amended complaint (ECF No. 12-2). Plaintiff is an  
 4 insurance company incorporated and with its principal place of business in Montana. (*Id.*  
 5 at 1.) Levine Law Group is a law firm incorporated and with its principal place of business  
 6 in Nevada. (*Id.*) Levine is an attorney licensed in Nevada and the president, secretary,  
 7 treasurer, and director of Levine Law Group. (*Id.*)

8           The Shustek Parties allege that Levine and Levine Law Group served as their  
 9 counsel. (ECF No. 12-2 at 3-4.) Under a written agreement with MVP, Levine "was given  
 10 title of General Counsel, Chief Administrative Officer, and Chief Operating Officer for  
 11 [MVP]" but "was an independent contractor." (*Id.* at 3-4.) "During Levine's involvement  
 12 with the Shustek Parties in 2017 and 2018, the Shustek Parties allege TPR was an  
 13 'incorporated Real Estate Investment Trust' focused on investing in parking lots and  
 14 parking garages, MVP was a Nevada limited liability company and 'was at one time the  
 15 advisor to TPR,' . . . and Shustek was 'a shareholder in and CEO of TPR and a principal  
 16 and [m]anager of' MVP." (ECF No. 1 at 2.)

17           Plaintiff asserts that the Shustek Parties allege the following. In or around 2017,  
 18 as TPR began taking steps to become publicly traded, Levine "began a campaign to oust  
 19 Shustek from TPR." (*Id.* at 3.) Levine "consistently took positions to paint Shustek in a  
 20 negative light, to lobby others to take positions adverse to him, and even at one point to  
 21 attempt to convince TPR to terminate Shustek so that Levine could take over as CEO of  
 22 TPR." (*Id.* at 4.) Levine "published without Shustek's knowledge or consent the false  
 23 statement to [the counsel of the initial public offering ("IPO") underwriters] that Shustek  
 24 was under FBI investigation." (*Id.*) Levine "started an internal investigation of [a] contrived  
 25 whistleblower complaint" against Shustek. (*Id.*) TPR engaged a law firm to conduct an  
 26 investigation into the whistleblower allegations, which "cost millions of dollars" and  
 27 "prevented TPR from meeting reporting and filing deadlines." (*Id.*) Shustek was eventually  
 28 exonerated from any wrongdoing and kept on as TPR's CEO. (*Id.* at 5.)

1           On June 19, 2018, MVP terminated its “employment” agreement with Levine due  
 2 to his conduct. (*Id.*) The Shustek Parties allege that because of Levine’s adverse actions,  
 3 “TPR was ultimately unable to proceed with its planned IPO” and the New York Stock  
 4 Exchange “eventually declined the previously approved listing,” resulting in millions of  
 5 dollars in loss of value to TPR. (*Id.*)

6           Plaintiff issued Defendants the Policy, Lawyers Professional Liability Insurance  
 7 Policy No. ALPS9032-16 for the policy period of May 15, 2019 to May 15, 2020. (*Id.* at 2,  
 8 12.) The Policy provides coverage for certain claims against Defendants subject to  
 9 several exclusions. (*Id.* at 12-15.)

10          On January 21, 2020, the Shustek Parties filed a complaint in state court against  
 11 Defendants, asserting claims for: (1) legal malpractice; (2) breach of fiduciary duty; (3)  
 12 breach of confidential relationship—against Levine; (4) interference with prospective  
 13 economic relations; (5) defamation per se—Shustek against Levine; (6) business  
 14 disparagement—TPR against Levine; (7) false light—Shustek against Levine; (8) breach  
 15 of the implied covenant of good faith and fair dealing; and (9) declaratory relief under NRS  
 16 Chapter 30. (*Id.* at 5-6.) Presently, Plaintiff is providing Defendants with representation in  
 17 the Shustek Action, “subject to a complete reservation of [Plaintiff’s] rights to deny  
 18 coverage and reimbursement of expenses incurred.” (*Id.* at 15-16, 22.)

19          On April 6, 2022, Plaintiff filed this action seeking a declaratory judgment that the  
 20 Policy does not afford coverage to Defendants for the Shustek Action, Plaintiff has no  
 21 duty to defend or indemnify Defendants in the Shustek Action, and Plaintiff is entitled to  
 22 reimbursement from Defendants for expenses incurred in defending them in the Shustek  
 23 Action. (*Id.* at 16, 22-23.) Plaintiff alleges that six coverage exclusions apply, which the  
 24 Court refers to as the: (1) “Professional Services” Exclusion; (2) “Reimbursement or  
 25 Disgorgement of Fees” Exclusion; (3) “Intentionally Wrongful Act” Exclusion; (4)  
 26 “Damages” Exclusion; (5) “Emotional Injury” Exclusion; and (6) “Prior to Effective Date”  
 27 Exclusion. (*Id.* at 16-22.)

28

1           On May 11, 2022, the Shustek Parties amended their state court complaint, adding  
 2 a fourth plaintiff, Vestin Mortgage, LLC, another Nevada limited liability company affiliated  
 3 with Shustek, and a tenth claim for relief against Defendants: “Legal Malpractice – SEC  
 4 Investigation and Complaint.” (ECF No. 12-2 at 2-3, 26-28.)

5 **III. DISCUSSION**

6           The Court first addresses whether it will in its discretion exercise its jurisdiction  
 7 over Plaintiff’s declaratory judgment claims. As further explained below, because the  
 8 Court ultimately finds that the relevant factors weigh against exercising jurisdiction and  
 9 therefore declines to do so, it need not—and does not—reach the merits of Defendants’  
 10 motion to dismiss Plaintiff’s claims under Federal Rules of Civil Procedure 12(b)(6) and  
 11 12(b)(3) nor their alternative motion to transfer venue.

12          **A. Jurisdiction**

13          The Declaratory Judgment Act states that “[i]n a case of actual controversy within  
 14 its jurisdiction . . . any court of the United States . . . may declare the rights and other legal  
 15 relations of any interested party seeking such declaration.” 28 U.S.C. § 2201(a). In actions  
 16 implicating the Declaratory Judgment Act, “the district court must first inquire whether  
 17 there is an actual case or controversy within its jurisdiction.” *Principal Life Ins. Co. v.*  
 18 *Robinson*, 394 F.3d 665, 669 (9th Cir. 2005) (citing *Am. States Ins. Co. v. Kearns*, 15  
 19 F.3d 142, 143 (9th Cir. 1994)). An insurer’s declaratory relief action to determine a duty  
 20 to defend and indemnify their insured in a pending state court case creates an actual case  
 21 or controversy within the meaning of Article III, even when the underlying liability action  
 22 has not yet proceeded to judgment. See *Kearns*, 15 F.3d at 144 (9th Cir. 1994). It is  
 23 undisputed that this case is justiciable, as Plaintiff’s request that the Court determine its  
 24 legal duty to defend and indemnify Defendants in the underlying Shustek Action is an  
 25 actual case and controversy within the meaning of Article III. See *id.*

26          But whether to hear a case under the Declaratory Judgment Act is committed to  
 27 the Court’s “unique and substantial discretion.” *Wilton v. Seven Falls Co.*, 515 U.S. 277,  
 28 286 (1995). “In exercising authority under the Declaratory Judgment Act, a district court

1 ‘should avoid needless determination of state law issues; it should discourage litigants  
 2 from filing declaratory actions as a means of forum shopping; and it should avoid  
 3 duplicative litigation.’’ *Acuity v. Cifuni*, Case No. 2:19-cv-01879-GMN-DJA, 2020 WL  
 4 5763606, at \*2 (D. Nev. Sept. 28, 2020) (referencing the three *Brillhart* factors); *see also*  
 5 *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942). These prudential considerations  
 6 reflect the core concerns of “how judicial economy, comity, and federalism are affected in  
 7 a given case.” *Gov’t Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1226 (9th Cir. 1998). The  
 8 Court therefore must decide whether to exercise its jurisdiction by analyzing the *Brillhart*  
 9 factors. *See Robinson*, 394 F.3d at 669 (citing *Kearns*, 15 F.3d at 143-44).

10 Defendants argue that the Court in its discretion should decline to exercise  
 11 jurisdiction over Plaintiff’s claims and dismiss them under the Declaratory Judgment Act,  
 12 in pertinent part, because: (1) the requested declaratory action will not settle all aspects  
 13 of the pending controversy; (2) the requested declaration of rights and status of the parties  
 14 requires determination of purely Nevada state law issues; and (3) this filing was reactive  
 15 to Defendants’ demand for coverage for the purpose of procedurally fencing in  
 16 Defendants in Plaintiff’s favored forum. (ECF No. 12 at 19-22.) Plaintiff counters that the  
 17 Court should exercise its jurisdiction because: (1) the exercise of jurisdiction does not  
 18 result in needless litigation of state law issues; (2) the coverage suit is not reactive  
 19 litigation, forum shopping, or procedural fencing; and (3) the exercise of jurisdiction will  
 20 not result in duplicative litigation. (ECF No. 15 at 14-18.) As explained below, the Court  
 21 agrees in pertinent part with Defendants and finds that exercising jurisdiction over  
 22 Plaintiff’s request for relief would ultimately not be appropriate under the *Brillhart* factors  
 23 and other prudential reasoning.

#### 24           **1.     Needless Litigation of State-Law Issues**

25       The first *Brillhart* factor—discouraging needless litigation of state-law issues—  
 26 weighs against exercising jurisdiction because each of the declarations that Plaintiff seeks  
 27 requires a determination of purely state-law issues. *See R.R. St. & Co. Inc. v. Transp.*  
 28 *Ins. Co.*, 656 F.3d 966, 975 (9th Cir. 2011) (“In prior cases, [the Ninth Circuit] ha[s]

1 recognized that needless determination of state law issues alone may support remand.");  
 2 see also *Acuity*, 2020 WL 5763606 at \*2 (reasoning there was little federal interest for a  
 3 district court sitting in diversity to decide an insurer's declaratory relief action that solely  
 4 involved interpretation of Nevada insurance law). "A 'needless determination of state law  
 5 may involve: (1) an ongoing parallel state court proceeding regarding the precise state  
 6 law issue, (2) an area of law Congress expressly left to the states, or (3) a lawsuit with no  
 7 compelling federal interest." *Rimini St., Inc. v. Hartford Fire Ins. Co.*, Case No. 2:15-cv-  
 8 2292-JCM-CWH, 2016 WL 3192709 (D. Nev. June 6, 2016) (citation omitted).

9 Here, Plaintiff's complaint involves only state insurance law, which is "an area that  
 10 Congress has expressly left to the states." See *Acuity*, 2020 WL 5763606 at \*2 (citing  
 11 *Cont'l Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1371 (9th Cir. 1991), overruled on other  
 12 grounds by *Dizol*, 133 F.3d at 1227). And jurisdiction is based on diversity jurisdiction  
 13 (ECF No. 1 at 2), indicating that there is no compelling federal interest in this action. See  
 14 *id.* ("Where . . . the sole basis of jurisdiction is diversity of citizenship, the federal interest  
 15 is at its nadir. Thus, the *Brillhart* policy of avoiding unnecessary declarations of state law  
 16 is especially strong.") (internal quotation marks and citation omitted).

17 Plaintiff argues that, as the Court found in *Cincinnati Specialty Underwriters Ins.*  
 18 *Co. v. Red Rock Hounds*, 511 F. Supp. 3d 1105, 1111 (D. Nev. 2021), the underlying  
 19 concern in *Brillhart* that "it would be uneconomical as well as vexatious for a federal court  
 20 to proceed in a declaratory judgment suit where another suit is pending in a state court  
 21 presenting the same issues, not governed by federal law, between the same parties," is  
 22 not present here. (ECF No. 15 at 15-16.) The Court disagrees with Plaintiff and  
 23 distinguishes this case from *Red Rock Hounds*. In *Red Rock Hounds*, the Court found  
 24 that the underlying state-court tort action did not involve the same contract claim, the  
 25 same parties, nor the "same issues" as the insurance coverage action before the Court.  
 26 See 511 F. Supp. 3d 1105 at 1111. Relatedly, later in the Court's *Red Rock Hounds*  
 27 analysis of the third *Brillhart* factor, the Court found that "it was conceivable that some  
 28 issues [the plaintiff] raises involve disputes of fact that will likely be litigated in the

underlying [tort action]—for example, whether [the defendants] had knowledge that the horse which injured [the state-court plaintiff] was aggressive and could injure guests would be relevant to the negligence and strict liability claims, and could also implicate whether [the state-court plaintiff's] injury was an ‘Expected or Intended Injury’ that could be excluded from the policy.” *Id.* at 1112. But the Court ultimately found that “[e]ven though there may be some overlapping facts litigated in both cases, the issues ultimately are different and unlikely to produce duplicative litigation.” *Id.*

8        While it is true that there is similarly no pending state court action between Plaintiff  
9 and Defendants on the same contract claim, in contrast to *Red Rock Hounds*, the  
10 overlapping issues here are more significant and, to certain extents, key to both the  
11 present insurance coverage suit and the underlying Shustek Action. Plaintiff's primary  
12 allegation that the "Professional Services" Exclusion<sup>3</sup> applies raises the disputed issue of  
13 whether Levine was an officer or other fiduciary to any of the organizational Shustek  
14 Parties. (ECF No. 12 at 15-16.) That same issue is also raised by at least the Shustek  
15 Parties' breach of fiduciary duty claim—whether Levine was an officer or fiduciary would  
16 need to be determined to determine what duties he owed the Shustek Parties and whether  
17 he breached them. (ECF No. 12-2 at 16-18.)

Also disputed by the parties is whether Levine was working for the Shustek Parties on behalf of Levine Law Group and therefore whether Levine Law Group was actually counsel to the Shustek Parties for purposes of liability for Levine's alleged wrongdoing. (ECF No. 12 at 15-16.) These issues implicate Plaintiff's claim that the "Professional Services" Exclusion applies because "Professional Services" is defined under the Policy

<sup>24</sup>           <sup>3</sup>The Policy excludes coverage for “any claim arising from or in connection with”:  
<sup>25</sup>           Any Professional Services that were rendered or should have been  
                  rendered to or in connection with any Organization . . . of which, at the time  
                  such Professional Services were or should have been rendered: (1) An  
                  Insured was an officer, director, employee or other fiduciary; . . . or (3) An  
                  Insured served in any capacity to directly or indirectly control, operate or  
                  manage such Organization.  
<sup>26</sup>  
<sup>27</sup>

28 || (ECF No. 1 at 16; ECF No. 1-2 at 14.)

1 as being “performed for or on behalf of the Named Insured,” the “Name Insured” being  
 2 Levine Law Group. (ECF No. 1-2 at 2, 13.) They are also key to almost all the Shustek  
 3 Parties’ claims against Levine Law Group, as almost all the alleged wrongdoing was  
 4 committed specifically by Levine and may or may not be imputed to Levine Law Group.  
 5 (ECF No. 12-2 at 5-15.) Accordingly, both actions raise the same determinative questions  
 6 of what capacity or capacities Levine was working in for the organizational Shustek  
 7 Parties.

8 Both actions also raise the same issue of whether Defendants’ conduct was  
 9 intentional or malicious. In the Shustek Action, that issue is raised in the first seven claims  
 10 by the Shustek Parties against Defendants. (ECF No. 12-2 at 16, 18-20, 22-23, 25  
 11 (“Levine’s conduct was knowing, intentional, oppressive, malicious . . . ”).) In this action,  
 12 that issue is raised by Plaintiff’s allegation that the “Intentionally Wrongful Act” Exclusion  
 13 applies. (ECF No. 1 at 17-18.) Under that exclusion, the Policy excludes coverage for  
 14 “any claim arising from or in connection with . . . [a]ny dishonest, fraudulent, criminal,  
 15 malicious, or intentionally wrongful or harmful act, error or omission committed by, at the  
 16 discretion of, or with the consent of an Insured, or any Personal Injury arising from or in  
 17 connection with such conduct.” (ECF No. 1 at 17-18; ECF No. 1-2 at 14.) If Defendants’  
 18 conduct is found to be not intentional nor malicious, but rather negligent, for instance, the  
 19 Policy could potentially provide coverage. (ECF No. 1-2 at 14.) This overlapping issue is  
 20 thus central to Plaintiff’s allegation that this exclusion applies and therefore, along with  
 21 the other significant overlapping issues discussed, creates a concern of needless  
 22 litigation of the same state-law issues. Accordingly, the first *Brillhart* factor favors  
 23 dismissal.

## 24                   **2. Discouraging Forum Shopping**

25                   Because there is no clear evidence of forum shopping, the second *Brillhart* factor  
 26 is neutral. See *State Farm Mut. Auto. Ins. Co. v. Garcia*, No. 2:13-cv-02099-GMN-VCF,  
 27 2014 WL 3421641, at \*4 (D. Nev. July 9, 2014) (finding the factor neutral when there is  
 28 no evidence of forum shopping); *Allstate Fire & Cas. Ins. Co. v. Diamond*, No. 2:14-cv-

1 1044-GMN-VCF, 2015 WL 265422, at \*3 (D. Nev. Jan. 21, 2015) (finding the same). While  
2 this action may appear to be “reactive litigation” that the Ninth Circuit disfavors, there is  
3 no pending state court action between the parties to the declaratory judgment action. See  
4 *Dizol*, 133 F.3d at 1225 (discouraging exercise of federal jurisdiction over a declaratory  
5 judgment action during the pendency of a parallel state court action involving the same  
6 issues and parties); *Garcia*, 2014 WL 3421641 at \*4 (considering it “important” that the  
7 insured defendant had not filed an action in state court against the declaratory judgment  
8 plaintiff). This factor therefore weighs neither for nor against dismissal.

### 9           **3.        Avoiding Duplicative Litigation**

10           The third *Brillhart* factor, cautioning against duplicative litigation, weighs against  
11 the Court’s exercise of jurisdiction. For the same reasons articulated under the analysis  
12 of the first *Brillhart* factor, the Court finds that even though the parties assert different  
13 claims in the Shustek Action and this action, both matters rely on the same set of facts  
14 and would ultimately require different factfinders and adjudicators to decide significant,  
15 overlapping factual and legal disputes.

16           For instance, as discussed above, key among the overlapping issues is whether  
17 Levine was an officer or other fiduciary of one of the organizational Shustek Parties at the  
18 time of his alleged wrongdoing. This issue appears to be complicated and could be  
19 resolved inconsistently by the state court and this Court. The Shustek Parties’ amended  
20 complaint alleges “Levine was counsel for Plaintiffs” and, under an agreement, “was given  
21 title of General Counsel, Chief Administrative Officer, and Chief Operating Officer for  
22 [MVP].” (ECF No. 12-2 at 3-4.) But the same agreement apparently made Levine “an  
23 independent contractor” to MVP, so the Shustek Parties also contend that Levine was  
24 “not actually an [MVP] officer.” (*Id.*) At the same time, however, the Shustek Parties allege  
25 that Levine was “effectively their General Counsel” and “held himself out” as such. (*Id.* at  
26 4-5.) The Shustek Parties also allege that Defendants violated “duties owed as attorney  
27 fiduciaries” and Levine “additionally violated his duties owed as a non-attorney fiduciary,”  
28 indicating that Levine may have owed fiduciary duties both as an attorney and as an

1 officer or other fiduciary. (*Id.* at 17.) Because of its apparent complexity owing to these  
2 contradictory facts, this issue therefore poses a risk of both duplicative litigation and  
3 inconsistent adjudication. The third factor thus favors dismissal.

4 Because the *Brillhart* factors weigh in favor of abstention, the Court declines to  
5 exercise jurisdiction over Plaintiff's declaratory judgment action at this time and therefore  
6 grants Defendants' motion to dismiss. The Court denies Defendants' alternative motion  
7 to transfer venue as moot.

8 **IV. CONCLUSION**

9 The Court notes that the parties made several arguments and cited to several  
10 cases not discussed above. The Court has reviewed these arguments and cases and  
11 determines that they do not warrant discussion as they do not affect the outcome of the  
12 motions before the Court.

13 It is therefore ordered that Defendants' motion to dismiss (ECF No. 12) is granted.

14 It is further ordered that Defendants' alternative motion to transfer venue (ECF No.  
15 13) is denied as moot.

16 It is further ordered that this action is dismissed without prejudice.

17 The Clerk of Court is directed to enter judgment in accordance with this order and  
18 close this case.

19 DATED THIS 19<sup>th</sup> Day of December 2022.



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21  
22 MIRANDA M. DU  
23 CHIEF UNITED STATES DISTRICT JUDGE  
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